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## **Interoffice Memorandum**

**DATE:** July 16, 2021

**TO:** Mayor and Councilmembers

**FROM:** Dana Ayers, AICP, Interim Community Development Director

**RE:** July 20, 2021 Agenda Item 8.b - Public Hearing on the Appeal of the Planning Commission Approval of the Extension of a Density Bonus, Site Plan Review Permit and Tree Removal Permit for The Olivia on Marsh Creek Development

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For the Council's consideration in Item 8.b of the Council's July 20, 2021 meeting agenda, attached are the minutes of the May 25, 2021 Planning Commission meeting at which the Commission discussed the extension request. The minutes and video of the May 25, 2021 Planning Commission meeting are also available online at <https://claytonca.gov/community-development/planning/planning-commission/planning-commission-agendas/>.

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**Minutes**  
**City of Clayton Planning Commission**  
**Regular Meeting**  
**Tuesday, May 25, 2021**

**1. CALL TO ORDER**

Chair A.J. Chippero called the meeting to order at 7:00 p.m.

**2. ROLL CALL**

Present:      Chair A.J. Chippero  
                 Vice Chair Terri Denslow  
                 Commissioner Bassam Altwal  
                 Commissioner Frank Gavidia  
                 Commissioner Ed Miller

Absent:        None

**3. PLEDGE OF ALLEGIANCE**

Commissioner Altwal lead the Pledge of Allegiance.

**4. PRESENTATIONS AND ANNOUNCEMENTS**

None.

**5. ACCEPTANCE OF THE AGENDA**

Commissioner Miller moved and Commissioner Altwal seconded a motion to accept the agenda as presented. The motion passed 5-0.

**6. PUBLIC COMMENT**

John Rubiales, representing the Clayton Business and Community Association (CBCA), provided the following comments:

- The CBCA has existed since 1984.
- We are a charity for the community, not a City department.
- Our motto is, "For the Good of the Clayton Community."
- We have lived up to our motto through our contributions to local festivals, Bocce Ball Courts, holiday decorations, Mrs. Claus event, and many other efforts.
- The profits from our well-known events have been put back into the community through grants, scholarships, and public improvements, just to name a few.
- Our success is due to the countless hours donated by our members and the thousands of volunteers who have given their time, without whom we could not exist.
- For many years at our monthly meetings, members of the Planning Commission and City Council who are also CBCA members have given us a report on what the Planning Commission and City Council have done, including votes that have already been recorded as part of a public meeting.

- At the City Council meeting on May 18, 2021, Commissioner Frank Gavidia, with the support of Councilmember Jim Diaz, indicated the following:
  - Planning Commission members were announcing Planning Commission decisions that were not already available to the public.
  - A private organization that gives money to the City gets to find out the results of Planning Commission votes before the public does.
- When Councilmember Holly Tillman asked what the comment regarding the private organization giving money to the City was based on, Councilmember Diaz indicated that the CBCA donated money to the City so that benches and trash receptacles could be installed in the Town Center.
- Commissioner Gavidia's accusations are incorrect and factually false.
- The Planning Commission rendered a vote at their meeting of February 23, 2021, which was immediately known to the taxpayers at the moment the vote was recorded.
- At the CBCA meeting of February 25, 2021, Chair Chippero reported on the Planning Commission's vote regarding the Oak Creek Canyon project from the Planning Commission meeting of February 23, 2021. Commissioner Gavidia recused himself from the Oak Creek Canyon public hearing.
- The CBCA has never given money to the City but, instead, donated tens of thousands of dollars for public events and public improvements over the decades.
- These donations were project-specific and did not entail the CBCA providing a gift of money to the City's treasury.
- To suggest that the CBCA has bought preferred access to information is ridiculous.
- Commissioner Gavidia and Councilmember Diaz are both members of the CBCA.
- Commissioner Gavidia and Councilmember Diaz should retract their statements in the same public form in which they were uttered.

## 7. **CONSENT CALENDAR**

### a. **Approval of Planning Commission Meeting Minutes.**

Approval of the minutes for the April 27, 2021 Planning Commission meeting.

**Vice Chair Denslow moved and Commissioner Altwal seconded a motion to approve the April 27, 2021 Planning Commission meeting minutes, as amended. The motion passed 5-0.**

## 8. **PUBLIC HEARINGS**

### a. **The Olivia on Marsh Creek – Request for Extension of Approvals of a Density Bonus (DBA-01-19), Site Plan Review Permit (SPR-04-17) and Tree Removal Permit (TRP-24-17).**

Request by William Jordan for a one-year extension to exercise the development approvals granted by the Clayton City Council on March 3, 2020, for The Olivia on Marsh Creek Project, an 81-unit senior rental housing development approved to be built on 3.02 acres located at 6170 High Street, 6450 Marsh Creek Road and 6490 Marsh Creek Road (Assessor's Parcel Nos. 119-021-063, 119-021-055 and 119-021-013).

Chair Chippero indicated that tonight's public hearing should focus on only the merits of the entitlement extension request.

Interim Community Development Director Dana Ayers provided an introduction and background information prior to the presentation of the staff report.

Commissioner Altwal asked how many times the Planning Commission had extended the project entitlements for the Creekside Terrace project.

Ms. Ayers responded that the Creekside Terrace project entitlements had been extended nine times in one-year increments.

Commissioner Altwal stated that he was serving on the Planning Commission and voted on the Creekside Terrace entitlement extensions four out of the nine times.

Commissioner Altwal inquired if, along with The Olivia on Marsh Creek Project ("Project") entitlement extension request, there were any amendments or changes to the Project from what was initially approved.

Ms. Ayers responded that, no, there were no requests for modifications to the scope of the Project or to the design elements related to the Project.

Bill Jordan, the Project developer, provided the following comments:

- He requested an extension to the Project entitlements due to the lawsuit that was filed against the City and himself.
- The judge took seven months to rule in his favor, and then the appeal took two more months which resulted in a nine-month delay in being able to commence preparation of the construction plans and associated documents for the Project.
- The court upheld the City's approval of the Project and found that the Project applications were done properly and in conformance with the law.
- Since this was an environmental litigation case, it would have been frowned upon by the court and the Project opponents if he had moved forward with removing the on-site trees and residences prior to the decision being rendered by the court.
- In the appellant's attorney's prayer in the writ of mandate, two requests were specified:
  - He, as the developer, shall suspend all activity that would result in any change or alteration to the physical environment related to the Project site until the respondents have taken such actions as may be necessary to bring their findings, determination, or decision regarding the project into compliance with the California Environmental Quality Act (CEQA).
  - A stay entailing a preliminary injunction and permanent injunction restraining the City of Clayton and real party of interest (which is Mr. Jordan as the developer) and their respective agents, employees, officers, and representatives from undertaking any activity to implement the Project in any way pending full compliance with CEQA.
- This suspension of any actions to initiate Project development and the nine-month delay caused by the lawsuit is why the extension request has been brought before the Planning Commission tonight.
- His intent was to settle the case and offer two alternatives to the petitioners during the litigation.
- He challenges the people who contributed to the GoFundMe campaign in opposition to the Project to ask members of the petitioners what he offered in terms of number of stories, units, and parking spaces.
- The group that claims to be Clayton for Responsible Development essentially supported the three-story option for the Project.

Commissioner Altwal inquired about the appeal period ending in January 2021 and asked if there was another appeal period that Mr. Jordan was currently waiting for expiration of.

Mr. Jordan indicated that there was no appeal period at present and that the developer team was currently in the process of preparing Project construction plans and associated documents for submittal to the City.

Commissioner Miller inquired if there were any other hindrances that would still be impeding approval of the entitlement extensions.

Mr. Jordan responded that, given the worldwide pandemic, everything has taken much longer in terms of correspondence between the developer team and applicable agencies involved with moving through the development pipeline to the construction phase of the Project.

Commissioner Miller inquired to Mr. Jordan when he anticipated pulling permits for the Project if the entitlement extension request was approved at tonight's meeting.

Mr. Jordan responded that he anticipated pulling permits for the Project in approximately 18 months.

Commissioner Gavidia inquired if the City Attorney was attending tonight's meeting.

City Manager Reina Schwartz responded that, yes, if there were questions for the City Attorney, she was available.

Commissioner Gavidia inquired what law specifically limits tonight's Planning Commission review to only the entitlement extension requests.

Ms. Ayers responded that Clayton Municipal Code (CMC) Section 17.64.030 authorizes the Planning Commission to grant a one-year extension of a previously-approved permit, and a condition of approval included in the City Council's action on March 3, 2020 as provided in City Council Resolution No. 07-2020 authorizes the Planning Commission to approve a one-time approval of Project entitlements for a one-year extension.

Commissioner Gavidia reiterated that CMC Section 17.64.030 and City Council Resolution No. 07-2020 were the only two regulatory documents that governed the Planning Commission's review of the entitlement extension request.

Ms. Ayers confirmed that those two regulatory documents were the basis of the entitlement extension request brought before the Planning Commission.

Commissioner Gavidia inquired if the applicable regulatory documents compelled the Planning Commission to vote one way or another on the entitlement extension request.

Ms. Ayers responded that there must be a showing of good cause for the Planning Commission to render a decision of approval for the entitlement extension request.

Commissioner Gavidia confirmed that there must be a showing of good cause for the applicant, but there is no burden of proof on the Planning Commission.

Ms. Ayers indicated that is correct, but there must be an explanation for the Planning Commission's decision based on evidence-supported findings.

Commissioner Gavidia indicated that CMC Section 17.64.030 indicates that the Planning Commission "may" extend the period of a permit, not that the Planning Commission "must" or "shall" extend the period of a permit. He inquired what the risk was to the City if the Planning Commission were to deny the entitlement extension request and what would be the applicant's options based on a denial.

City Attorney Mala Subramanian responded that the applicant can appeal the Planning Commission's denial to the City Council and added that, in order to deny the entitlement extension request, the Planning Commission would have to make a finding of denial supported by evidence showing why the entitlement request was denied.

Commissioner Gavidia inquired where is it specified that a Planning Commission denial of the entitlement extension request must be based on an evidence-supported finding of denial.

Ms. Subramanian responded that CMC Section 17.64.080 requires the Planning Commission to make findings and, regarding an appeal, CMC Section 17.68.020.C establishes that an applicant can appeal a Planning Commission decision if the specified findings of the Planning Commission are not supported by evidence.

Commissioner Gavidia inquired what the risk to the City was if the Planning Commission's decision was appealed to the City Council, if the City Council's decision was challenged in a court of law, and if the City were to lose the case.

Ms. Subramanian responded that, in addition to the City paying its own attorney's fees, the City would incur the cost of other parties' attorney fees, as well.

Commissioner Gavidia indicated that, as he reads the statute, the Planning Commission has discretion, yet he feels as if the Planning Commission is being told that it does not have discretion.

Ms. Subramanian indicated that the Planning Commission has discretion and that a decision rendered for this type of request has to be based on findings with evidence supporting the findings.

Commissioner Gavidia indicated that, since the applicant has to have good cause and since there is no definition of "good cause" provided, the Planning Commission's decision would be subjective.

Ms. Subramanian indicated that the Planning Commission would still have to make evidence-supported findings as to whether or not good cause exists.

Commissioner Gavidia inquired if there is anything preventing the applicant from moving forward with next steps in Project processing.

Ms. Subramanian responded that the question should be deferred to the applicant but that she was not aware of a legal reason preventing the applicant from moving forward.

Commissioner Gavidia asked whether the delay in moving forward with Project processing was based only on the opposing attorney's prayer or whether it was required that Project processing be halted.

Ms. Subramanian responded that it was not required that Project processing be suspended but, given the circumstances at the time, moving forward would have been done at great substantial risk if the City had not prevailed in the lawsuit.

Vice Chair Denslow asked Ms. Subramanian to elaborate on an earlier comment related to the developer not moving forward with Project processing.

Ms. Subramanian responded that it is standard practice for a developer not to move forward during a lawsuit until the litigation has been completed and the developer has prevailed in the lawsuit because it would be an extreme financial risk for the developer to incur the high cost of preparing construction plans and associated documents and then lose the lawsuit.

Ms. Ayers elaborated that, by "standard practice," it is a practice within the industry that a developer would not move forward with paying the high cost of architects and civil engineers preparing complex mechanical, electrical, plumbing, foundational, and structural details until a developer is assured that they can moved forward, as preparation of those types of plans is costly.

Vice Chair Denslow asked whether Ms. Ayers' and Ms. Subramanian's experience was that developers held off on moving forward because they thought the project design could change as a result of the lawsuit or because they wanted to be assured that they would prevail in the lawsuit.

Ms. Ayers responded that, generally, a project design is not changed as a result of a lawsuit. More specifically, the issue is not whether a project should be designed one way or the other; the issue is whether a project should have been approved or denied as it was presented to the decision-making body. Courts of law and judges do not generally change a project.

Ms. Subramanian indicated that there had been a mandatory settlement conference where all the parties met to see if there was an opportunity to settle prior to litigation. Had a settlement been made, the lawsuit could have been dismissed.

Vice Chair Denslow inquired whether CMC Section 17.64.080 authorized de novo review of the Project.

Ms. Subramanian responded that, no, CMC Section 17.64.080 did not authorize a de novo review of the Project.

Ms. Ayers added that the applicant had not proposed or requested that any changes be made to the Project that would result in any new discretionary review by the Planning Commission as part of the entitlement extension request.

Vice Chair Denslow inquired about previously-approved projects that had entitlement extension requests brought before the Planning Commission, and whether those projects been re-opened for review with changes to the project being made.

Ms. Ayers responded that, in her experience with the City, when the Creekside Terrace project entitlement extension request was brought before the Planning Commission, the project was not re-opened for review and there were no changes made to the project as a result of the Planning Commission's approval of the entitlement extension request. Furthermore, she indicated that, when reviewing other projects' entitlement extension requests over the past several years, the projects were not re-opened for further discretionary review and no additional changes were made to those projects.

Vice Chair Denslow asked if the Project entitlements needed to be renewed until the Project is complete or just until the first building permit is pulled.

Ms. Ayers responded that the current entitlements remain valid as long as the first building permit is obtained. The current expiration date of the Project entitlements is March 3, 2022. The Project entitlements would expire if no building permit was issued prior to the expiration date.

Vice Chair Denslow requested that Mr. Jordan clarify that, based on her understanding of the timeline of the litigation and appeal conclusion date, the Project had been able to commence as of February 9, 2021. What had been done for the Project since February 9?

Mr. Jordan provided the following responses:

- Our architectural firm is preparing the architectural plans.
- The structural plans have been completed.
- We are currently in the process of distributing the mechanical, electrical, and plumbing (MEP) bid.
- The civil plans have been completed.
- Of the next steps for the Project, two of the four steps are done, and we are working on finalizing the other two steps.
- Given the impacts of the pandemic, everything has changed in terms of working with firms and agencies as the expeditiousness of these organizations is taking much longer these days.
- As a result of these pandemic-related delays, we need more time, which is one of the reasons we are requesting the entitlement extensions.

Vice Chair Denslow asked Mr. Jordan why he indicated that it would take 18 months to get through the permitting phase of the Project.

Mr. Jordan provided the following responses:

- As I indicated previously, because of the pandemic, everything has been delayed.
- It took me 60 days just to get a public hearing before the Planning Commission for the Project entitlement extension request.
- Everything is taking more time.
- Each of the professional design personnel may take up to two months to complete their respective reviews and completion of duties.
- To Ms. Ayers, how long would City staff in the City Engineering Department and Community Development Department take to complete their review of the Project plans before the plans are submitted to the Contra Costa County Department of Conservation and Development (County)?



Ms. Ayers provided the following responses:

- Our City Engineering staff is not available to respond at this meeting, so I am not sure how long Engineering staff would take to complete their review.
- Plan check process starts with the submittal of a building application form and a set of Project plans.
- Given a Project of this magnitude, the mechanical, plumbing, engineering, and structural plans are lengthy and detailed.
- Typically, submittal of plans for a large project involves a plan set being two inches thick with a multitude of sheets filled with details and specifications that have to be meticulously reviewed and, usually, the plans have to be revised and resubmitted after the first review.
- The plan checker will write a letter outlining all the necessary revisions to the plans and will submit the letter to the architect/designer. The architect/designer has to respond to the requested revisions, resubmit the revised plans, and perhaps the plans will pass review on the second time around but even that can be rare, and it may take a third review to finalize the plans before the developer receives a building permit.
- In its entirety, and with consideration given to the pandemic-related delays, each round of review and revision may take two to three months.

Vice Chair Denslow inquired to Ms. Ayers whether 18 months for Project permit processing sounded like a reasonable estimate.

Ms. Ayers responded that 18 months should be a sufficient amount of time; however, there is no way to be certain of how long it would take the applicant's architect and designer to resubmit revised and corrected plans.

Vice Chair Denslow asked Mr. Jordan why the extension was being requested now and not closer to the expiration date of March 3, 2022.

Mr. Jordan responded that, given the pandemic and resulting anticipated delays in processing plans, he wanted to make sure he had enough time to move forward accordingly.

Vice Chair Denslow asked Ms. Ayers whether this Project was still considered a senior housing Project.

Ms. Ayers responded, yes, the Project was still a senior housing Project, as no element of the Project had changed.

Commissioner Miller asked if the Project will be deeded for age-restricted housing.

Ms. Ayers responded that the seven affordable housing units will be deed restricted to ensure those units are occupied by income-appropriate households, but the remainder of the units will not be deed restricted.

Commissioner Altwal stated to Ms. Subramanian that he heard her mention the word "evidence" during the course of tonight's meeting and he wanted to confirm that opinions do not count as evidence.

Ms. Subramanian responded that, as many in attendance at the meeting tonight have expertise in certain fields, an opinion that is supported by evidence could be viable.

Commissioner Altwal added that an opinion could be supported by case history.

Ms. Subramanian concurred with Commissioner Altwal's statement.

Commissioner Gavidia asked if there was anything in local Code or State law that regulates the typical amount of time that a permit is valid.

Ms. Ayers responded that typically a permit is valid for one or two years and she was not aware of anything in State law that determines the time limit of development permit validity.

Commissioner Gavidia asked what the determining factor was for establishing a one- or two-year time limit for permit validity.

Ms. Ayers responded that a one- to two-year time for permit validity is a typical standard that she has seen with jurisdictions where she had experience. However, in cases where the jurisdiction is in a disaster relief area, for example, she has observed that the time default limit for permit validity was extended to three years. The impetus for a jurisdiction shortening the time limit to less than one year would usually be done because of a code compliance matter where the jurisdiction would want corrective action taken expeditiously.

Commissioner Gavidia asked what the time limit was on permit validity for the Clayton Community Church project.

Ms. Ayers responded that the entitlements for the Clayton Community Church project are valid for two years. She added that CMC Section 17.64.010 establishes that each permit issued under the provisions of CMC Title 17, which is not used, exercised, or established within the time specified on the permit, or if no time is specified, within one year after the granting of the permit, shall be void. So, for the City of Clayton, a permit shall be valid for 12 months unless a longer or shorter period of permit validity is specified as part of project approval.

Commissioner Gavidia inquired how this time limit of permit validity is established on a project-specific basis.

Ms. Ayers responded that staff will recommend a duration of permit validity based on the complexity of the project. For example, for an addition on a single-family residence, 12 months should be a sufficient amount of time to obtain a building permit. However, for new developments that are more complex, entailing above grade construction, below grade construction, and installation of infrastructure such as storm drains, water connections, and sewer connections, staff will generally recommend a longer period of permit validity as was done with the Clayton Community Church project with a recommendation for a two-year approval term.

Commissioner Gavidia asked if the Planning Commission had discretion on the amount of time the Project entitlements can be extended.

Ms. Ayers responded that the Code Section referenced in the staff report allows the Project entitlements to be extended for a maximum of 12 months.

Commissioner Gavidia asked if the Planning Commission had the discretion to shorten the Project entitlement extension period to less than 12 months.

Ms. Subramanian responded that any reduction in time would need to be explained as to why the entitlement extension period was reduced to less than one year.

Commissioner Altwal requested confirmation that the one-year extension would be from the current expiration date of March 3, 2022.

Ms. Ayers confirmed that, yes, if the extension was approved, the entitlements would not expire until March 3, 2023.

Vice Chair Denslow asked if the sensitive land use ordinance was applicable to this Project.

Ms. Ayers indicated that the sensitive land use ordinance was not applicable as the Project was exempt.

Vice Chair Denslow inquired why the Project was exempt from the sensitive land use ordinance.

Ms. Subramanian responded that CMC Section 17.22.060 establishes an exemption to any property where the General Plan land use designation was amended to become Multifamily High Density Residential in order to comply with State law to meet the City's 2007-2014 Regional Housing Needs Allocation obligation.

Chair Chippero indicated that this discussion was not germane to the topic at hand which is to focus on the merits of the extension request only.

The public hearing was opened.

The following comments were expressed by Dee Vieria in support of the request:

- A developer has every right to request an extension of Project entitlements.
- Given the nine-month legal delay and the pandemic, we support the one-year extension.
- Please approve the Project entitlement extension request.

The following comments were expressed by Drea York, Dan Hummer, and Gary Hood in opposition to the project:

- The Planning Commission has discretion to deny the Project entitlement extension request.
- If any of the Commissioners vote yes on the Project entitlement extension request, you will be seen as a high-density housing advocate.
- Some of the Commissioners have political ambitions, and we will remember which candidate was a high-density housing advocate.
- The permit processing for the Project should have already commenced.
- Please deny the Project entitlement extension request.
- There are concerns about the intent of the developer.
- The existing residence on the Project site was vacated, but we noticed that someone has moved into the existing residence, and the rents for the subject units would not cover the cost of Project construction.
- This delay is because the Project does not pencil out financially since there is a high vacancy rate in the Bay Area, and the cost of construction materials is currently very expensive.

Ms. Ayers indicated that staff received several emailed comments prior to 5:00 p.m. this evening and that all of those emails had been sent to the Commissioners as well as posted to the City's website.

The public hearing was closed.

Commissioner Miller indicated that he found Mr. Hood's comments to be cogent and on-point but added that the delays caused by the pandemic are very real as he personally experienced this when speaking with a contractor about constructing a pergola on his property and that the pandemic has expanded the times of communication and the approval processes involved with project permitting.

Commissioner Altwal provided the following comments:

- In his experience working with projects larger in scope than the subject Project, he has found that 18 months is tight, even before the impacts of the pandemic occurred, and projects will typically take longer than 18 months to get through the development pipeline.
- Ms. Ayers mentioned two rounds of plan check comments can be the case with plan check review but he felt that was very generous because he has witnessed five, six, or eight rounds of plan check comments for a project.
- CMC Section 17.64.030 establishes that a good cause must be shown for permit extension, and a lawsuit is definitely a good cause.
- No developer or businessman would risk spending thousands of dollars on preparing construction plans without knowing the outcome of a lawsuit.
- The merits of the Project did not change so we should be focusing only on the entitlement extensions.
- The Creekside Terrace project, a City-sponsored project, received nine years of extensions with very few people commenting on those extensions.
- One of the public speakers addressed our integrity; the Planning Commission approved nine entitlement extensions for a City-sponsored project like Creekside Terrace but, when a private citizen with a private project requests only one extension with showing of good cause, then that is where our integrity is.
- I support approval of the Project entitlement extension request.

Commissioner Gavidia provided the following comments:

- Our decision tonight is subjective.
- Once the Project is constructed, it is permanent.
- The applicant requested the extension because of the lawsuit, not because of the pandemic.
- During the Covid-19 lockdown, construction was declared an essential industry, so construction of this Project could have commenced already.
- The Governor determined that high-density projects were a priority and had to be completed.
- The applicant is a businessowner which involves taking risks.
- The Planning Commission is not here to mitigate the applicant's risks as a business owner.
- Why approve the Project entitlement extension request if nothing is stopping the applicant from moving forward on the construction plan submittal phase of the Project right now?
- It is interesting that someone has moved into the existing on-site residence.
- He has concerns that the developer does not have the financial wherewithal to complete this Project.

- The Creekside Terrace project entitlements were extended nine times and no construction occurred.
- The State wants us to get housing projects constructed.
- A developer should be prepared for lawsuits and for delays.
- Based on these considerations, I am not inclined to approve the Project entitlement extension request.

Vice Chair Denslow provided the following comments:

- Good cause for the Project entitlement extension request has been shown.
- When the Planning Commission approved the Creekside Terrace entitlement extensions, it was done right before the permits were going to expire.
- The Project has caused considerable division within our community.
- It would be good to see more progress from the developer before considering an extension request.
- I have not seen reason or precedent for granting an extension this far ahead of the entitlement expiration date.

Commissioner Gavidia inquired if the Project entitlement extension request can be tabled until the applicant demonstrates that he will continue to construct the Project.

Ms. Ayers responded that the Creekside Terrace project was unique in that the City was granting extensions for itself. However, in the case of the Project, you have a private developer who is interested in pursuing the entitlement extension request. If this item were tabled, the applicant has other options, one of them being an appeal of the tabling of this item to the City Council, although she said she would have to confirm that based on the Commission's by-laws.

Ms. Subramanian indicated that there is no requirement that the applicant request this extension right before it expires. If the applicant has already requested an extension, there would be nothing gained by tabling or continuing the item since the impacts of the lawsuit and pandemic have already happened, so the circumstances of those impacts would not change.

Ms. Ayers indicated that there would be no additional information elicited from the developer between now and whatever date this item would be continued to. There would have to be a justification as to why the Planning Commission is not acting on the item now.

Commissioner Gavidia indicated that, as Vice Chair Denslow stated, perhaps some sign of progress from the developer.

Commissioner Altwal provided the following comments:

- The difference between the Creekside Terrace project and this Project is that the Creekside Terrace project did not have a developer whereas this Project has a developer who is making a request.
- The Planning Commission has to respond to the developer's request.
- If we approve this request, we already have the justification for approval.
- If we deny this request, then we have to provide a justification for denial which we have not done yet.
- To Ms. Subramanian he asked, if the Planning Commission denied the developer's request, can the developer request another extension from the Planning Commission prior to the permit expiring on March 3, 2022?

Ms. Subramanian responded the developer's only recourse would be to appeal the Planning Commission's denial to the City Council. A second entitlement extension request before the Planning Commission would not be an option for the developer.

Commissioner Miller expressed support of Vice Chair Denslow's observations and explained that the Planning Commission will not see another entitlement request for this Project as we did with the Creekside Terrace project since the developer had only one opportunity to request a one-year extension. Furthermore, the developer had made a showing of good cause based on the lawsuit which delayed his project for almost one year.

Commissioner Gavidia asked if the developer had only one opportunity to request a one-year extension.

Ms. Ayers affirmed that the developer could request only one, one-year extension and referenced Condition of Approval 16 in the Resolution that the City Council adopted for the Project on March 3, 2020.

Vice Chair Denslow inquired why the Creekside Terrace was able to be extended repeatedly but this Project only has one opportunity to be extended.

Ms. Ayers responded that two provisions apply for this Project: the CMC Section 17.64.030 which addresses the good cause that must be shown as to why the extension is warranted and allows that extension to be extended for 12 months, and Condition of Approval 16 from the City Council Resolution which specifies that a one-time extension of one year could be granted for the Project entitlements.

Vice Chair Denslow inquired what would happen if the Commission approved the Project entitlement extension request and there are no permits pulled.

Ms. Ayers responded that there could be two outcomes if the Planning Commission approved the Project entitlement extension request until March 3, 2023, and the developer did not pull a permit:

- The entitlements would expire; or
- The developer could request an amendment to or deletion of Condition of Approval 16 so that more entitlement extension could be requested.

Vice Chair Denslow indicated that, even though there is pressure at the State level to provide more housing and good cause has been shown for this extension, it feels like the request for the extension has been made too early. She then inquired what the result would be if this item was continued.

Ms. Subramanian responded that many of the Commissioners had indicated tonight that good cause has been shown so, if there was a vote for continuance, a justification would have to be provided as to why the continuance is necessary. Also, as stated previously, there is no requirement for the developer to request an extension on the Project entitlement right before the entitlements expire.

Commissioner Altwal indicated that it is not the role of the Planning Commission to tell someone when they should apply for a request. If the item is brought before the Planning Commission, the Commission must review it and, based on the evidence presented, make a decision to approve or deny the request. Another issue to consider is that the State could change the development laws again and increase the density requirement for jurisdictions.

Vice Chair Denslow asked Commissioner Altwal for clarification.

Commissioner Altwal explained that there are new laws being finalized at the State level that could increase the density on parcels within the City. In addition, if the Project entitlements lapse, given the implication of these new laws, this developer or another developer could potentially re-apply for a development that has an even higher density than the Project, and the City would be required by the State to approve an even higher density development.

Commissioner Gavidia indicated that these considerations regarding State law were speculative. The Commission had three choices regarding the Project entitlement extension request: approve, continue, or deny. He expressed his opinion that continuing the item was a viable decision, as Vice Chair Denslow indicated.

Commissioner Altwal asked Vice Chair Denslow what would be the justification for tabling this item.

Vice Chair Denslow responded that she believed there was good cause for the entitlement extensions but that it seemed like the timing was too early to bring the entitlement extension before the Commission.

Commissioner Altwal indicated that, in order to table this item, the Commission needed justification to continue the item above and beyond not liking the timing of the developer's request. The Planning Commission does not decide when items are placed on the agenda. Items are placed on the agenda at the time they are placed on the agenda. This timing issue is not justification to continue the item.

Chair Chippero provided the following comments:

- The Planning Commission has a responsibility to not put the City at risk.
- One lawsuit can easily wipe out the City's reserves.
- The developer has shown good cause in two ways: delays caused by the lawsuit and impacts caused by the pandemic.
- This questioning of the developer being able to afford to construct the Project is speculation.
- We should be working with the developer since he is willing to work with the City.
- He has observed what has been expressed on social media about this Project, and some of it amounts to harassment based on speculation.

Commissioner Altwal inquired to Ms. Subramanian would a Commissioner have to recuse themselves from the public hearing if they donated money for the lawsuit against the City for approving this Project.

Ms. Subramanian replied research is needed before responding to that question.

Commissioner Gavidia provided the following comments:

- Disagree that a lawsuit regarding denial of the Project entitlement extension request would wipe out the City's reserves.
- He is not part of Save Clayton, and he does not post on social media.
- Vice Chair Denslow made a valid point regarding tabling this item.
- The language in CMC Section 17.64.030 establishes that the Planning Commission "may"—not "must" or "shall"—extend the period of a permit.
- To Ms. Ayers, can our decision tonight be appealed?

Ms. Ayers responded that any decision made by the Planning Commission can be appealed to the City Council.

Commissioner Gavidia asked if an appeal of the Planning Commission's decision tonight would delay the project.

Ms. Ayers responded no, an appeal would not delay the project as the developer could still move forward with submitting construction plans for plan check and would have until March 3, 2022 to obtain a building permit for the Project.

Commissioner Gavidia inquired in the event that an appeal of the Planning Commission's approval of the Project entitlement extension request was filed and the City Council upheld the Planning Commission's approval, would there be time added onto the new expiration date of March 3, 2023.

Ms. Ayers responded no, there would not be time added to the entitlement expiration date. Either the Project entitlements will expire on March 3, 2022 or they will expire on March 3, 2023.

Vice Chair Denslow inquired if the Planning Commission could add a performance-based condition of approval that the developer would have to make a certain amount of progress on the Project by a certain date.

Ms. Subramanian responded that including a performance-based condition of approval would have to be substantiated by findings supported by evidence as to why the performance-based condition of approval is necessary.

Ms. Ayers added that CMC Section 17.64.030 already stipulates a performance-based requirement that a permit must be exercised, used, or established within 12 months or the permit is no longer valid.

Commissioner Miller indicated that he has considered the claim that, based on someone moving back into the existing on-site residence, the developer is not acting in good faith with the intention of developing the Project but, instead, might sell the subject property. Whether the current developer constructs the Project or sells the subject property to a new developer does not change the scope of the Project because the Project entitlements have already been approved as proposed and conditioned. There are two outcomes: either the Project will be constructed as conditionally approved, or it will not be constructed and the entitlements will expire. In either outcome, there is not an additional impact above and beyond what was already approved and anticipated to be built. Based on these two outcomes, there is nothing compelling the Planning Commission to add a performance-based condition of approval that will ensure that the developer is acting in good faith and will actually build what was approved for construction.

**Commissioner Altwal moved and Chair Chippero seconded a motion to adopt Planning Commission Resolution No. 04-2021 approving a one-year extension to March 3, 2023 of the development permit approvals for The Olivia on Marsh Creek Project. The motion passed 3-1-1 (No – Commissioner Gavidia; Abstain – Vice Chair Denslow).**



**9. ACTION ITEMS**

None.

**10. PLANNING COMMISSION REQUESTS AND UPCOMING AGENDA DEVELOPMENT**

Chair Chippero indicated that his term ends next month on June 30, 2021 and, after a decade of service to the community, he will not re-apply to the Planning Commission due to his time commitments with his job and family. Commissioner Miller, if interested in continuing to serve on the Planning Commission, will have to re-apply. As a result, there will be two openings on the Planning Commission starting July 1, 2021.

City Manager Reina Schwartz indicated that the City will be accepting applications for the Planning Commission until June 9, 2021.

**10. ADJOURNMENT**

The meeting was adjourned at 9:12 p.m. to the regularly-scheduled meeting of the Planning Commission on June 8, 2021.

Respectfully submitted:



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Dana Ayers, AICP, Interim Secretary

Approved by the Clayton Planning Commission:



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A.J. Chippero, Chair